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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BRYAN JOSEPH LEWIS, Defendant and Appellant.	B212776 (Los Angeles County Super. Ct. No. GA061922)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Bryan Joseph Lewis appeals from the judgment entered after his conviction by a jury on one count of second degree murder. Lewis contends his counsel provided ineffective representation because, at trial, he failed to present evidence of Lewis's good character, evidence Lewis contends would have led the jury to convict him of manslaughter rather than murder. Alternatively, Lewis contends the trial court erred in denying his motion for a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of June 5, 2005 Bashir Abdullah drove to a Pasadena restaurant to pick up his girlfriend, Naomi Harrell, whose shift had just ended. As Harrell opened the door to sit in the passenger seat of the car, she saw a young African-American man walk up to the driver's window of the car where Abdullah sat. Because the radio was playing, Harrell heard little of the conversation between the two men; but she testified she heard Abdullah say, "I didn't do that shit, homie," before taking a small plastic bag of marijuana out of the car's center console and handing it to the other man, who stood by the window. Instead of taking the marijuana, the man pulled out a semi-automatic handgun and fired it at Abdullah. Harrell, who testified she heard as many as nine shots, scrambled out of the car and hid behind a nearby truck. She saw the man walk back to a green Jetta parked in the same lot and get into the front passenger seat. The green Jetta, driven by a young African-American woman, drove away. Abdullah, who suffered multiple gunshot wounds, including one to his chest that severed an aorta, died of his injuries.

A day later, the young woman Harrell had seen driving the green Jetta, Zendra Pace, surrendered to the Pasadena police.[1] At trial Pace testified she and Lewis, who had known each other for years and had been dating for the past month, had driven to the restaurant to eat. After parking and walking toward the door of the restaurant, Lewis told her he had changed his mind about eating. The pair returned to the green Jetta. Instead of getting into the passenger seat, Lewis told Pace he wanted to speak to a friend and

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[1] Pace pleaded guilty to being an accessory after the fact to the murder. (See Pen. Code, § 32.)

walked over to Abdullah and Harrell's car. Although Pace knew Abdullah, she could not see him well enough to identify him. After a short conversation between the two men, she saw Lewis point a gun and fire at the driver. When Lewis returned, Pace asked him why he had shot the man; Lewis told her to drive away.

After they left the restaurant parking lot, Lewis told Pace he had shot Abdullah and was sorry and had not meant to do it. According to Lewis, "It was either him or me." Pace and Lewis then drove around for several hours before stopping at one of Pace's relatives' house. Later that evening Pace drove Lewis to his mother's home in Los Angeles. The next day Lewis left Los Angeles by bus. After visiting relatives for three weeks, Lewis returned to Los Angeles and turned himself into the police.[2]

Lewis's friend, Chris Merchant, testified in Lewis's defense that he, Lewis and Pace had been friends for years. Merchant also knew Abdullah, who had been the best friend of Pace's brother, Derrick Potts. Merchant described Abdullah as "big," "kind of tall" and "older than the rest of us." In the past Abdullah had taunted the younger Merchant and Lewis by "throwing bodies," a game of physical intimidation he forced on them. Abdullah was a member of the Altadena Blocc Crips, and Merchant had seen him on at least one occasion with a gun. Potts had been murdered in March 2005, a few months before Lewis shot Abdullah. Since Potts's death, Lewis had been acting "paranoid" and no longer liked to go out with his friends; but Merchant did not know of any conflicts Lewis had with anyone.

Los Angeles County Sheriff's Deputy Joel Nebel, a gang detective in Altadena, testified he had encountered Abdullah on at least 10 occasions and knew him to be an active member of the Altadena Blocc Crips.

Lewis then testified on his own behalf. He stated he bought the gun in early 2005 after he had been assaulted by a trusted friend. He had also been physically abused some

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[2] Lewis was charged by information with one count of murder (Pen. Code, § 187, subd. (a)), with special allegations a principal was armed when committing the offense (§ 12022, subd. (a)(1)) and he had intentionally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)).

years earlier. Lewis explained he did not always carry the gun and did not show it to Pace, Merchant or members of his family. After Potts's death, he spent more time at Pace's home for the mutual comfort of their families. Because the police investigating Potts's murder interviewed the family on several occasions, some of Potts's friends asked in a threatening manner what family members had told the police. Lewis testified he no longer felt safe at the Pace residence and described the environment there as "paranoid." Because of his fear, Lewis began carrying his gun more often.

On the day of the shooting, Lewis decided he did not want to eat at the restaurant because he felt underdressed among the Sunday diners. He and Pace were returning to the car when he saw someone gesture to him from another parked car. Lewis told Pace he was going to speak with a friend and walked over to the car. Abdullah sat in the driver's seat, leaning back with his feet on the dashboard. Lewis asked him, "What's up, man. Where you been at?" Abdullah answered, "You know where I been at . . . in jail." When Lewis asked why, Abdullah responded, "Don't play stupid with me." He then claimed a girl had been "telling" on him. Lewis tried to explain the situation was "not what he thought it was"; but Abdullah said, "Yeah right. I know what she said. You harboring snitches." Lewis again tried to explain; but Abdullah said, "Fuck that. I'm going to noodle you and that bitch."

Lewis, who knew Abdullah was a gang member and owned a gun,[3] understood Abdullah to be threatening to kill him and Pace. Abdullah was also angry. When Abdullah reached for what Lewis thought was a "black handle" under his shirt and moved his legs as if to get out of the car, Lewis fired at him. Lewis claimed he never intended to kill Abdullah and shot at his legs to keep him from getting out of the car. He contradicted Harrell, insisting he did not buy marijuana from Abdullah and shot his gun only three times. On cross-examination Lewis claimed he had "seen a gun," but also admitted he shot first without knowing whether Abdullah had a gun. Lewis also admitted he never told Pace about the alleged threat Abdullah had made against her.

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[3] No gun was found in Abdullah's car after he was shot.

The jury convicted Lewis of second degree murder and found the firearm enhancements true. Lewis filed a motion for a new trial asking, alternatively, that the verdict be set aside for insufficient evidence or be modified to voluntary manslaughter based on imperfect self-defense. In support of the motion Lewis's counsel submitted 19 letters of support from relatives, some of whom had experience in the criminal justice system. The trial court acknowledged the strong support of Lewis's family but denied the motion, concluding sufficient evidence supported the jury's verdict. The court sentenced Lewis to an aggregate state prison term of 40 years to life, consisting of 15 years to life for the murder, plus 25 years to life for the firearm enhancement under Penal Code section 12022.53, subdivision (d).

DISCUSSION

1. *Lewis Has Failed To Demonstrate He Received Ineffective Assistance of Counsel*

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms but also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 ["[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 ["'[i]f the record sheds no light on why counsel acted or failed to act in the

manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention [that counsel provided ineffective assistance] must be rejected'" (second set of brackets in original)].)

Lewis contends his counsel was ineffective because, in submitting 19 letters from friends and relatives attesting to Lewis's upstanding character, he demonstrated the availability of compelling evidence of good character that might have been sufficient to negate the jury's finding of implied malice. Lewis argues, if the jury had learned of his reputation for being a peacemaker within his family, the jury would have been likely to find he acted in what he believed to be self-defense, whether or not that belief was objectively reasonable, leading to, at most, a conviction for voluntary manslaughter. (See, e.g., Pen. Code, § 192, subd. (a); *People v. Stitely* (2005) 35 Cal.4th 514, 551 [imperfect or unreasonable self-defense is one form of voluntary manslaughter comprising an unlawful killing in which the defendant, while harboring either an intent to kill or a conscious disregard for life, kills in an actual but unreasonable belief in the need to act in self-defense].) Lewis relies upon the decision in *People v. McAlpin* (1991) 53 Cal.3d 1289 (*McAlpin*), in which the Supreme Court reversed a conviction because the trial court had erroneously excluded the testimony of three witnesses who were prepared to testify, in a lewd conduct case, that the defendant had a reputation for having normal sexual tastes and was regarded as a person of high moral character. (*Id*. at pp. 1310-1311.)

We are not asked here, however, to review a trial court's exclusion of character evidence[4] but instead to find Lewis's counsel provided constitutionally defective representation when he chose not to present testimony relating to Lewis's non-violent

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[4] Evidence Code section 1102, subdivision (a), provides that opinion "evidence of the defendant's character or a trait of his character" is admissible "to prove his conduct in conformity with such character or trait of character." Subdivision (b) of the same statute authorizes character evidence when "[o]ffered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

character. As Justice Broussard cautioned in his *McAlpin* dissent, "a defendant's introduction of good character evidence is by no means a risk-free proposition. 'Two grave risks face the criminal defendant who chooses to . . . offer[] evidence of her good character. The first and most serious risk . . . arises when the prosecutor cross-examines the defendant's character witnesses. . . . [W]hen cross-examining either a reputation or opinion witness, the prosecutor can inquire about *specific acts* in the defendant's past to assess the value of the reputation or opinion testimony. . . . [Although in] theory, the trier of fact cannot use the prosecutor's questions about specific acts as evidence that the acts occurred . . . [and] upon request, the defendant is entitled to a limiting jury instruction[,] . . . [it is well recognized] that jurors probably cannot follow a judge's instruction not to use the question and responses about specific acts as evidence that the acts did occur. . . . The second risk is [that] . . . the prosecutor can call rebuttal witnesses to testify that the defendant's character is bad. As Justice Jackson explained in *Michelson* [*v. United States* (1948) 335 U.S. 469], a part of "[t]he price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." [Citation.] Accordingly, as the Court of Appeal explained in *People v. Pangelina* (1984) 153 Cal.App.3d 1, 8: 'For [these] reason[s], most experienced criminal lawyers do not present character evidence unless their client's reputation is unassailable.'" (*McAlpin, supra,* 53 Cal.3d at p. 1315 (dis. opn. of Broussard, J.).)

The People point out that, assuming the individuals who wrote the letters had been willing to testify on Lewis's behalf, the prosecutor would have been free to impeach Lewis with evidence of his misdemeanor conviction for disturbing the peace (for which he was on probation at the time of the shooting) and his ownership and concealment (acknowledged at trial but never characterized as illegal) of an unregistered handgun. The People contend Lewis's past illegal acts were "live ammunition for the prosecution to fire if the target were presented." (*People v. Pangelina, supra,* 153 Cal.App.3d at p. 8.)

Lewis responds that the Supreme Court has recently "rejected the notion that '*any* evidence introduced by defendant of his "good character" will open the door to *any and all* "bad character" evidence the prosecution can dredge up. . . . [T]he scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf.'" (*People v. Loker* (2008) 44 Cal.4th 691, 709.)

Nonetheless, the *Loker* Court also cautioned, "The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. If the testimony is 'not limited to any singular incident, personality trait, or aspect of [the defendant's] background,' but 'paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character,' rebuttal evidence of similarly broad scope is warranted." (*People v. Loker, supra,* 44 Cal.4th at p. 709.) The evidence proffered by Lewis's counsel at sentencing consisted of letters from friends and relatives containing broadly phrased descriptions of Lewis, in the words of his appellate lawyer as "law-abiding, hard-working, and magnanimous." Based on the letters as indicators of the proposed testimony, it is virtually certain the prosecutor would have been permitted to introduce evidence of Lewis's conviction for disturbing the peace, a fact that plainly undermines any notion Lewis's temperament was non-violent. To the extent witnesses were able to couch these qualities in terms of specific events, Lewis may have been able to circumscribe the scope of rebuttal, but that possibility is both speculative and remote.

The very existence of this debate demonstrates the risk associated with introduction of character evidence in this case and marks the decision of Lewis's counsel not to introduce such evidence as necessarily tactical in nature. """[E]ven debatable trial tactics""" do not constitute ineffective assistance of counsel. (*People v. Weaver* (2001) 26 Cal.4th 876, 928.) Under the limited scope of inquiry available to us, we see no alternative but to reject Lewis's assertion of ineffective assistance of counsel. (See *Strickland v. Washington, supra,* 466 U.S. at p. 689 [courts must presume challenged

action "'might be considered sound trial strategy'" absent evidence to contrary]; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

2. *The Trial Court Did Not Err in Denying Lewis's New Trial Motion*

A trial court has discretion to grant a new trial if, in its view, a conviction is contrary to the evidence. (Pen. Code, § 1181, subd. 6.) In deciding a motion for new trial, the trial court weighs the evidence independently, but is guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. (*People v. Davis* (1995) 10 Cal.4th 463, 524; accord, *People v. Lewis* (2001) 26 Cal.4th 334, 364.) "The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. '"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*Davis,* at p. 524.) An abuse of discretion will also be found "if the trial court base[s] its decision on impermissible factors [citation] or on an incorrect legal standard [citations]." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

Lewis contends the trial court's statements in denying the motion demonstrate it misunderstood its role and failed to apply the correct legal standard in deciding the motion.[5] Lewis argues that, by failing to independently weigh the evidence, the trial

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[5] In denying the motion the trial court stated, "As I indicated to counsel I have given an enormous amount of thought to this case and I understand my obligation in considering a motion such as the motion for new trial before me to [be] one in which I am permitted to independently view the evidence. That I also, however, cannot ignore the jury's verdict or reject it [if] it's supported by the substantial evidence. In other words, I can't arbitrarily ignore their verdict. It's a little different from . . . being able to just say what I think I would have done if I had been a juror. I have before me a . . . person . . . who has no record, and I'm ignoring the disturbing the peace [conviction].) I don't consider that anything at the moment. He has no record. He has an incredible amount of family support. He, by virtue of the letter that he wrote to me evidences himself to be

court improperly deferred to the jury. (See *People v. Robarge* (1953) 41 Cal.2d 628, 634-635 [reversing trial court's denial of a new trial motion in part because "trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict"].)

We do not read the trial court's extensive and considered remarks to be anything other than a sensitive and thorough execution of its obligation under applicable standards. Admittedly troubled by the harsh mandatory sentence, the trial court scoured the record to ensure denial of the motion was appropriate, both legally and factually. The court articulated specific factors in Lewis's favor but also acknowledged the extensive evidence in support of the jury's verdict. Recognizing the bounds of its discretion, the court denied the motion. There was no error.

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intelligent, bright, motivated, ambitious and on a path to being a member of society of which we could all be proud. And then I have a situation where he is carrying a gun. He explained his reasons for doing that. He appears to have had an unintended encounter with Mr. Abdullah. He had a conversation with Mr. Abdullah, which Mr. Lewis recounted and apparently the jury rejected. . . . Mr. Lewis testified again about a motion that Mr. Abdullah made that caused him fear. It is also clear that Mr. Abdullah was not armed. I know Mr. Lewis likely had no way of knowing that. And then Mr. Lewis removed the gun that he was carrying and shot Mr. Abdullah at least three times. . . . So I have an individual who had everything going for him, although not the easiest life, and committed this crime. And I have spent lots of time thinking about what my role and obligations are given that situation. . . . I know what the penalty is and I know that I have no discretion with respect to that . . . . I think that's the part that's troubling me the most to be very honest. Now, . . . I know I can't consider that. It's been very difficult for me to put that out of my mind, but I believe that I have. . . . I do not believe that in good [conscience] I can say that there's [insufficient] evidence to support the jurors' finding of implied malice. I reread the instruction [for] implied malice, and I believe the evidence is [sufficient] to evidence implied malice. I believe therefore that I'm obliged under the law to deny the motion for new trial based upon the legal standards that I'm required to [use]."

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.